

# ESSAY

## How Long Is Long Enough? Judicial Review of Agency Comment Periods

*Rachel Layne\**

### ABSTRACT

*Federal agencies are granted discretion to shape their rulemaking procedures within the confines of the Administrative Procedure Act (“APA”). Although this flexibility is typically beneficial, it creates openings for agencies to use inadequate procedures that do not meaningfully engage the public, a fundamental purpose of the quasi-legislative rulemaking process. During the Biden Administration, the U.S. Securities and Exchange Commission (“SEC”) proposed an unprecedented volume of major rules with short comment periods, raising questions about agency discretion to set comment periods and the scope of judicial review when a comment period is allegedly insufficient.*

*This Note surveys approaches to judicial review of comment periods. First, it analyzes the restrictions on review of comment periods imposed by the Supreme Court’s landmark decision *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, which limited courts’ ability to impose additional rulemaking procedures beyond those mandated by the APA. Next, it assesses the standard of review and tests that courts use to review comment periods, including by examining a recent Sixth Circuit decision regarding comment period length of an SEC rule. Finally, it proposes factors for courts to consider when an agency is engaging in a flurry of rulemaking, including (1) interrelated rule proposals, (2) the significance of the rule, and (3) previous agency rulemaking activity.*

---

\* J.D. 2025, The George Washington University Law School; B.A. 2019, The George Washington University. I would like to thank the editors and staff of *The George Washington Law Review* for their hard work editing this piece and Professors Robert Glicksman and Aram Gavoor for encouraging my interest in administrative law. Thank you to my family and friends for their unwavering support.

## TABLE OF CONTENTS

INTRODUCTION . . . . .	1239
I. THE SIGNIFICANCE OF PUBLIC COMMENT . . . . .	1242
A. <i>The APA’s Public Comment Requirement</i> . . . . .	1242
B. <i>Why Comment Periods Matter</i> . . . . .	1244
C. <i>The SEC’s Rise in Rulemaking Activity and Short Comment Periods</i> . . . . .	1245
II. CURRENT APPROACHES TO REVIEW OF COMMENT PERIODS . . . . .	1248
A. <i>Threshold Question: Is Review Permissible Under Vermont Yankee?</i> . . . . .	1248
1. <i>Vermont Yankee’s Constraints on Procedure</i> . . . . .	1249
2. <i>Administrative Common Law</i> . . . . .	1251
3. <i>Judicial Review of Comment Periods Is Permissible Under Vermont Yankee</i> . . . . .	1252
B. <i>Standard of Review</i> . . . . .	1253
1. <i>Arbitrary and Capricious</i> . . . . .	1253
2. <i>De Novo Review</i> . . . . .	1254
C. <i>Tests for Review and a Recent SEC Example</i> . . . . .	1255
1. <i>Specific Durations</i> . . . . .	1255
2. <i>Meaningful Opportunity to Comment</i> . . . . .	1256
3. <i>A Recent SEC Example Represents Diverging Approaches</i> . . . . .	1257
III. PROPOSED FACTORS FOR HIGH-VOLUME RULEMAKING . . . . .	1259
A. <i>Interrelated Nature of Rules</i> . . . . .	1260
B. <i>Significance of the Rule</i> . . . . .	1263
C. <i>Comparison to Previous Agency Action</i> . . . . .	1264
CONCLUSION . . . . .	1265

## INTRODUCTION

The Administrative Procedure Act (“APA”)<sup>1</sup> governs the federal administrative process.<sup>2</sup> Congress passed the APA in 1946 to establish procedural requirements for federal government agencies to follow when promulgating rules and adjudicating disputes.<sup>3</sup> The APA provides transparency, uniformity, and notice requirements for administrative

<sup>1</sup> 5 U.S.C. §§ 551–559, 701–706.

<sup>2</sup> ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW 53 (3d ed. 2020).

<sup>3</sup> Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706); GLICKSMAN & LEVY, *supra* note 2, at 53–55.

lawmaking.<sup>4</sup> It has been described as a “framework” statute because it “sets out structural guidelines for governance and procedural guideposts” for agencies to follow.<sup>5</sup> However, the statute’s minimal requirements for notice-and-comment rulemaking—the process agencies use to create binding regulations by soliciting public input<sup>6</sup>—give agencies discretion to adapt the required procedures as needed to achieve their goals.<sup>7</sup> When allegations arise that an agency used inadequate procedures, regulated parties can challenge the procedures in court.<sup>8</sup>

During the Biden Administration, the U.S. Securities and Exchange Commission (“SEC”) proposed a large volume of economically significant rules with short comment periods.<sup>9</sup> The financial industry argued that this increase in the volume and pace of rulemaking diminished its ability to research, analyze, and sufficiently comment on proposed rules, undermining the notice-and-comment process’s fundamental purpose of soliciting meaningful public feedback.<sup>10</sup> Two lawsuits challenging an SEC rule alleged that the rule’s short comment period violated the APA by failing to meet the minimum standards established by the statute.<sup>11</sup> Although the Fifth Circuit did not address the issue,<sup>12</sup> both district

---

<sup>4</sup> William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1923–27 (2023).

<sup>5</sup> *Id.* at 1926; see also Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363 (“[T]he Supreme Court regarded the APA as a sort of superstatute, or subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished . . . .”); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1223–37 (2015) (characterizing the APA as a “superstatute”).

<sup>6</sup> See GLICKSMAN & LEVY, *supra* note 2, at 417–22.

<sup>7</sup> See CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW AND PRACTICE § 4:30, Westlaw (database updated Mar. 2024).

<sup>8</sup> See 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

<sup>9</sup> See Stefania Palma, *Finance Hits Back Against US Regulator’s Rulemaking Spree*, FIN. TIMES (Sept. 11, 2023), <https://www.ft.com/content/3d12a3c7-32af-4164-ae6a-6526000c7336> [<https://perma.cc/3UXE-MRT5>]. A comment period is the opportunity that an agency engaged in notice-and-comment rulemaking must provide to the public to submit written feedback on the agency’s proposed rule. See GLICKSMAN & LEVY, *supra* note 2, at 56–60.

<sup>10</sup> See Kenneth E. Bentsen, Jr., *The Unprecedented Speed and Volume of SEC Rulemaking*, SIFMA (Sept. 21, 2023), <https://www.sifma.org/resources/news/the-unprecedented-speed-and-volume-of-sec-rulemaking/> [<https://perma.cc/B7N3-65XA>]; Jennifer J. Schulp & Nicholas Anthony, *The SEC Short-Changes Public Comment*, CATO INST.: CATO AT LIBERTY (Jan. 14, 2022, 9:39 AM), <https://www.cato.org/blog/sec-short-changes-public-comment> [<https://perma.cc/93FK-4GBX>].

<sup>11</sup> See Nat’l Ass’n of Mfrs. v. SEC, 644 F. Supp. 3d 342, 346 (W.D. Tex. 2022), *rev’d on other grounds*, 105 F.4th 802 (5th Cir. 2024); Chamber of Com. of the U.S. v. SEC, 670 F. Supp. 3d 537, 550 (M.D. Tenn. 2023), *aff’d*, 115 F.4th 740 (6th Cir. 2024).

<sup>12</sup> See *Nat’l Ass’n of Mfrs.*, 105 F.4th at 810 n.4.

courts and the Sixth Circuit examined the rule's comment period, each with varying approaches and results.<sup>13</sup>

This Note surveys the varying approaches to judicial review of comment periods and examines whether and how review of comment periods should occur.<sup>14</sup> It argues that judicial review of comment periods is permissible,<sup>15</sup> and at times favorable, particularly when agencies attempt to enact sweeping regulatory overhauls.<sup>16</sup>

Agencies act in a quasi-legislative manner by creating regulatory regimes that shape the behavior and activities of the public.<sup>17</sup> In the U.S. democratic system, this large grant of power obligates agencies to meaningfully engage the public.<sup>18</sup> During the Biden Administration, the SEC diminished the significance of public feedback in the rulemaking process when it proposed a high volume of complex rules with short comment periods.<sup>19</sup> When an agency proposes rules in this manner and faces subsequent challenges to such rules, the reviewing court should give special consideration to these circumstances.

Part I explains why public comment matters in the context of agency rulemaking and examines the SEC's rulemaking activity during the Biden Administration.<sup>20</sup> Part II addresses the threshold question of whether the Supreme Court's *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>21</sup> decision permits courts to

---

<sup>13</sup> See *infra* Sections I.A, II.C.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> See *infra* Section II.A.

<sup>16</sup> See *infra* Part III.

<sup>17</sup> GLICKSMAN & LEVY, *supra* note 2, at 110–11.

<sup>18</sup> SEC Commissioner Hester Peirce has reflected this sentiment on various occasions. See, e.g., Hester M. Peirce, *Rat Farms and Rule Comments—Statement on Comment Period Lengths*, SEC (Dec. 10, 2021), <https://www.sec.gov/news/statement/peirce-rat-farms-and-rule-comments-121021> [<https://perma.cc/B3H5-9J9R>] (“The notice and comment process is intended to be a dialogue. The regulatory conversation flows only when the Commission affords the commenting public sufficient time both to review and analyze proposals thoroughly and to formulate fully articulated opinions and suggestions.”); Hester M. Peirce, *Rip Current Rulemakings: Statement on the Regulatory Flexibility Agenda*, SEC (June 22, 2022) [hereinafter *Rip Current Rulemakings*], <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-regulatory-flexibility-agenda-062222> [<https://perma.cc/ACS3-HXE6>] (“We can avoid creating regulatory rip currents by recalibrating our agenda to focus on issues core to the protection of investors and operation of our markets and by slowing down the pace to ensure that we and the public can think about what we are doing.”); Hester M. Peirce, Comm’r, Sec. & Exch. Comm’n, *At the SEC: Nothing but Crickets* Remarks at SEC Speaks (Apr. 2, 2024) [hereinafter *Crickets*], <https://www.sec.gov/news/speech/peirce-remarks-sec-speaks-040224> [<https://perma.cc/46K6-C5PH>] (“The Commission should think about each rule proposal as an opportunity to foster a public discussion with the goal of developing the best solution to a carefully identified problem . . .”).

<sup>19</sup> See *Rip Current Rulemakings*, *supra* note 18 (“We have abandoned our careful and considered approach to altering regulation in favor of effecting hasty and sweeping change.”).

<sup>20</sup> This Note uses the SEC as a case study to explore agency comment periods, but it does not comment on the merits of the SEC's proposals.

<sup>21</sup> 435 U.S. 519 (1978).

review comment periods. It also surveys the standard of review and tests that courts use when reviewing comment periods. Part III proposes three factors that a court should consider when reviewing a comment period set by an agency engaged in a flurry of rulemaking:<sup>22</sup> (1) whether the rule is closely related to other rules being proposed, (2) the relative significance of the rule, and (3) the volume of recent rulemaking compared to previous agency rulemaking activity.

## I. THE SIGNIFICANCE OF PUBLIC COMMENT

### A. *The APA's Public Comment Requirement*

Congress tasks federal agencies with executing legislative policy choices through regulation.<sup>23</sup> Agencies fulfill this task in part by rulemaking, in which agencies promulgate rules that carry the force of law and regulate conduct.<sup>24</sup> The APA governs the federal rulemaking process.<sup>25</sup> APA section 553 is the core provision for notice-and-comment rulemaking, a commonly used form of rulemaking that is binding but does not require formal, trial-like procedures.<sup>26</sup> The basic procedures required by section 553 are notice, an opportunity for public comment, and a concise statement of the agency's basis and purpose for the rule.<sup>27</sup>

Notably, section 553(c) does not specify the length of the comment period, only requiring "an opportunity to participate in the rule making through submission of written data, views, or arguments . . . ."<sup>28</sup> Because agencies are not bound to a minimum comment period, they are expected to allow a "reasonable" time for comment, with "'reasonableness' judged in relation to the particular facts of each rulemaking."<sup>29</sup> Generally, more complex rules will require longer comment periods.<sup>30</sup>

---

<sup>22</sup> No numeric threshold constitutes a flurry of rules. This term intends to refer to situations in which an agency significantly increases its pace of rulemaking compared to its historic rulemaking activity and in a manner that is likely to elicit criticism from public commenters.

<sup>23</sup> See GLICKSMAN & LEVY, *supra* note 2, at 5.

<sup>24</sup> *Id.* at 361.

<sup>25</sup> *Id.* at 53.

<sup>26</sup> *Id.* at 417–23.

<sup>27</sup> *Id.* Section 553(b) requires agencies to publish notice of the rulemaking in the *Federal Register* with information about the "time, place, and nature of public rule making proceedings; . . . the legal authority under which the rule is proposed; and . . . a description of the" proposed rule's substance. 5 U.S.C. § 553(b). Section 553(c) requires agencies to provide an opportunity for public comment and "incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.* § 553(c). Section 553(d) requires the publication of a final rule no fewer than thirty days before it goes into effect. *Id.* § 553(d).

<sup>28</sup> 5 U.S.C. § 553(c).

<sup>29</sup> JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 307 (6th ed. 2018).

<sup>30</sup> KOCH & MURPHY, *supra* note 7, § 4:33.

Although agencies have discretion over comment period length,<sup>31</sup> the executive branch has provided some guidance.<sup>32</sup> The Clinton and Obama Administrations issued executive orders that specified sixty days as the typical minimum comment period necessary to “afford the public a meaningful opportunity to comment” on proposed rules,<sup>33</sup> although this is not a legal requirement.<sup>34</sup> In addition, the Administrative Conference of the United States (“ACUS”)<sup>35</sup> advised in 1994 that Congress amend the APA to require a thirty-day mandatory minimum comment period with a good cause exception for shorter periods.<sup>36</sup> The thirty-day standard is not codified, but the Supreme Court has recognized it as a baseline minimum comment period.<sup>37</sup> Separately, many federal agencies require at least thirty- or sixty-day comment periods while recognizing that more time is often necessary for technical and complex rules.<sup>38</sup>

Although thirty to sixty days is the norm, the APA’s statutory silence on comment period length gives agencies discretion to adjust comment periods depending on the complexity of a rule and the

---

<sup>31</sup> The lack of a mandatory comment period length in section 553 characterizes this discretion. *See* 5 U.S.C. § 553(c).

<sup>32</sup> *See, e.g.*, Exec. Order No. 12,866 § 6(a), 3 C.F.R. 638, 644–45 (1994); Exec. Order No. 13,563 § 2, 3 C.F.R. 215, 216 (2012); Exec. Order No. 14,094 § 2, 3 C.F.R. 369, 369–70 (2024).

<sup>33</sup> Exec. Order No. 12,866 § 6(a), 3 C.F.R. at 644; Exec. Order No. 13,563 § 2, 3 C.F.R. at 216. Additionally, the Biden Administration issued an executive order requiring that “opportunities for public participation . . . be designed to promote equitable and meaningful participation by a range of interested or affected parties, including underserved communities.” Exec. Order No. 14,094 § 2(a), 3 C.F.R. at 369–70.

<sup>34</sup> *Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919, 936 (N.D. Cal. 2021).

<sup>35</sup> ACUS is an independent agency charged with recommending improvements to the efficiency and fairness of the rulemaking process. *See About ACUS*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/about-acus> [<https://perma.cc/Y7L3-Z22U>].

<sup>36</sup> Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure, 59 Fed. Reg. 4669, 4672–74 (Feb. 1, 1994). ACUS did not define “good cause” in this context, but the APA contains a “good cause” exception that permits an agency to bypass notice-and-comment rulemaking when it finds “that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(B).

<sup>37</sup> *See Azar v. Allina Health Servs.*, 587 U.S. 566, 570 (2019) (describing “the APA minimum [comment period] of 30 days”).

<sup>38</sup> *See, e.g., Rulemaking Process*, FED. COMM’NS COMM’N, <https://www.fcc.gov/about-fcc/rulemaking-process> [<https://perma.cc/6KXL-4CR6>] (describing thirty days as the minimum comment period but allowing for “much longer periods” for “highly technical and complex matters” or “shorter periods where there is a need to act quickly”); *Rulemaking Process*, U.S. DEP’T OF TRANSP. (Mar. 25, 2025), <https://www.transportation.gov/regulations/rulemaking-process> [<https://perma.cc/39ZR-7XLC>] (providing for sixty days “[g]enerally” but providing “much longer periods” if necessary or “shorter periods where we can provide justification for them”); *A Guide to the Rulemaking Process*, OFF. OF THE FED. REG., <https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf> [<https://perma.cc/Z3EN-ENFC>] (stating that thirty to sixty days is typical but “180 days or more” may be provided for “complex rulemakings” and shorter periods may be permissible “when that can be justified”).

agency's timeframe to act.<sup>39</sup> The APA's legislative history states that the APA's procedures are minimum requirements and that "[m]atters of great import . . . should naturally be accorded more elaborate public procedures."<sup>40</sup> The length of a comment period can affect the level of transparency and public involvement in the rulemaking process.<sup>41</sup>

### B. *Why Comment Periods Matter*

Courts have stated that the purpose of notice-and-comment procedures is to provide for "meaningful" public participation in the rulemaking process.<sup>42</sup> The APA's requirement that agencies publish rules for public comment intends to benefit both the agencies promulgating rules and regulated entities.<sup>43</sup> On one hand, agencies benefit because they receive feedback from diverse parties that will be affected by the proposed rule.<sup>44</sup> Public comments can help the agency understand public opinion, potential compliance challenges, and whether or how to revise the rule before final publication.<sup>45</sup> On the other hand, regulated entities and members of the public benefit from the notice-and-comment process because it allows them to voice suggestions and concerns about a proposed rule before it is enacted, with the hope that the agency will modify the rule.<sup>46</sup> In addition, comments enter the administrative record, which serves as a court's focal point for review in the event of a future legal challenge.<sup>47</sup> Although more participation does not necessarily equate to better rulemaking—special interests may be overrepresented and increased participation can slow the process<sup>48</sup>—public input is typically considered beneficial.<sup>49</sup>

Meaningful public participation requires a sufficiently long comment period because many notices of proposed rulemaking contain

---

<sup>39</sup> See STEVEN J. BALLA, PUBLIC COMMENTING ON FEDERAL AGENCY REGULATIONS: RESEARCH ON CURRENT PRACTICES AND RECOMMENDATIONS TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 3–4 (Mar. 15, 2011), <https://www.acus.gov/sites/default/files/COR-Balla-Report-Circulated.pdf> [<https://perma.cc/V825-DWLY>].

<sup>40</sup> H.R. REP. NO. 79-1980, at 259 (1946).

<sup>41</sup> See BALLA, *supra* note 39, at 3.

<sup>42</sup> See, e.g., *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011); *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009).

<sup>43</sup> See Eskridge & Ferejohn, *supra* note 4, at 1922.

<sup>44</sup> See *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005); *Prometheus Radio Project*, 652 F.3d at 449.

<sup>45</sup> See KOCH & MURPHY, *supra* note 7, § 4:33 (explaining that agency staff aim to create "the best possible rule" by obtaining the best information and a variety of perspectives).

<sup>46</sup> See *id.* (explaining that interested parties participate in the rulemaking process to "provide the agency decisionmakers with information and assure that they consider it").

<sup>47</sup> See GLICKSMAN & LEVY, *supra* note 2, at 195–99.

<sup>48</sup> See KOCH & MURPHY, *supra* note 7, § 4:33.

<sup>49</sup> See *id.* ("In general anything that expands participation is valued.").

highly sophisticated information, which frequently demands significant time and effort from stakeholders to prepare informed comments.<sup>50</sup> A comment period that is too short, therefore, may compromise public participation and limit the quality of public feedback that an agency receives.<sup>51</sup> It also may preclude an agency from considering potential unintended consequences of the rule that the public may have raised had it been given more time to analyze the proposal.<sup>52</sup> If an agency proposes several significant rules with short comment periods, smaller entities and individuals without the resources to submit comments and share their views are likely to be disproportionately impacted.<sup>53</sup>

Additionally, an insufficient comment period may create the perception that an agency has already decided the final form of the rule, making the comment process a formality with little actual impact.<sup>54</sup> This behavior goes against the spirit of the APA's notice-and-comment procedures and the broader notion that government should be both participatory and collaborative.<sup>55</sup> Now more than ever, as the Supreme Court has pared back agency power,<sup>56</sup> agencies should provide comment periods that are proportional to a rule's complexity and their cumulative rulemaking activity to minimize further political and legal scrutiny.

### C. *The SEC's Rise in Rulemaking Activity and Short Comment Periods*

The SEC is the federal agency responsible for enforcing the federal securities laws.<sup>57</sup> Its regulatory remit derives from a series of statutes<sup>58</sup>

---

<sup>50</sup> See BALLA, *supra* note 39, at 3.

<sup>51</sup> See *Crickets*, *supra* note 18.

<sup>52</sup> See Schulp & Anthony, *supra* note 10.

<sup>53</sup> See *id.*; *Rip Current Rulemakings*, *supra* note 18 (“I also have concerns that the volume of comment requests will give even greater weight to the views of bigger players and mute the voices of retail investors, smaller advisers, broker-dealers, mutual funds, and companies, which lack the resources necessary to give each of these proposals the attention they deserve.”).

<sup>54</sup> See Letter from Alt. Credit Council et al. to Gary Gensler, Chair, SEC 6, 14 (Apr. 5, 2022) [hereinafter *Joint Comment Letter*], [https://www.sifma.org/wp-content/uploads/2022/02/SEC\\_Joint-Trades\\_Comment-Period-Letter\\_4-5-2022.pdf](https://www.sifma.org/wp-content/uploads/2022/02/SEC_Joint-Trades_Comment-Period-Letter_4-5-2022.pdf) [<https://perma.cc/C4AS-6D2C>] (joint comment letter from twenty-five industry associations to the SEC).

<sup>55</sup> See Memorandum on Transparency and Open Government, 2009 DAILY COMP. PRES. Doc. 10 (Jan. 21, 2009) (memorandum from President Obama on the importance of government transparency).

<sup>56</sup> See, e.g., *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (overruling *Chevron* deference); *SEC v. Jarkesy*, 603 U.S. 109, 120–21 (2024) (limiting the scope of agency in-house adjudicatory proceedings for claims with roots in common law).

<sup>57</sup> *Mission*, SEC (Aug. 9, 2023), <https://www.sec.gov/about/mission> [<https://perma.cc/EP5L-Z9G4>].

<sup>58</sup> See *The Laws that Govern the Securities Industry*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry> [<https://perma.cc/9ZNU-UYSS>].

that give the SEC “broad regulatory authority over significant parts of the securities industry.”<sup>59</sup> During the first half of the Biden Administration, the SEC dramatically increased the pace and volume of rulemaking activity compared to previous administrations.<sup>60</sup> The SEC proposed fifty-two new rules during Chair Gary Gensler’s first two and a half years in office, many more than Obama Administration Chair Mary Jo White and Trump Administration Chair Jay Clayton, who proposed twenty-eight and thirty-five rules, respectively.<sup>61</sup> The average comment period of proposed rules under Gensler’s first three years was forty-seven days—measured from the date of publication in the *Federal Register*—which is nearly twenty percent fewer days than previous chairs’ durations.<sup>62</sup>

The quick pace and high volume of the SEC’s rulemaking is not inherently problematic. But as the new rulemaking trends became apparent, financial industry groups began to argue that shorter comment periods diminished their ability to provide meaningful comments and could result in economic harm.<sup>63</sup> These industry groups raised the concern that the sheer volume and complexity of rule proposals over a short time span prevented them from adequately analyzing how the proposals would impact their businesses, retail investors, and the economy.<sup>64</sup> These arguments were coming from large, well-resourced industry groups—like the Securities Industry and Financial Markets Association (“SIFMA”)—that typically have the means to provide extensive comments in response to agency rulemakings.<sup>65</sup> Their concern indicates that

---

<sup>59</sup> EVA SU, CONG. RSCH. SERV., IF11714, INTRODUCTION TO FINANCIAL SERVICES: THE SECURITIES AND EXCHANGE COMMISSION (SEC) (2023).

<sup>60</sup> See Bentsen, *supra* note 10.

<sup>61</sup> See *SEC Rulemaking Tracker*, SIFMA (Jan. 20, 2025), <https://www.sifma.org/resources/general/sec-rulemaking-tracker/> [<https://perma.cc/NZ3Y-AT9N>] (choose “SEC Rulemaking Tracker (xls)” from the main page; then open the downloaded spreadsheet; then click the tab titled “7. Proposals Comparison”). The first Obama Administration Chair Mary Schapiro issued and finalized more rules than Gensler in roughly three years—sixty-six proposed and final rules in total—but her tenure occurred during the tumultuous 2007–2008 financial crisis, the resulting Great Recession, and the passage of statutorily mandated financial reforms. See *SEC Overreach: Examining the Need for Reform: Hearing Before the Subcomm. on Cap. Mkts. of the H. Comm. on Fin. Servs.*, 118th Cong. 66–68 (2024) [hereinafter *SEC Overreach Hearing*] (statement of John A. Gulliver, Executive Director, Committee on Capital Markets Regulation).

<sup>62</sup> See *SEC Rulemaking Tracker*, *supra* note 61 (click the tab titled “6. Comment Period Comparison”).

<sup>63</sup> See Eric J. Pan, *The SEC’s Multi-Rule Pileup*, INV. CO. INST. (Oct. 3, 2023), <https://www.ici.org/viewpoints/23-view-sec-multi-rule> [<https://perma.cc/UZ34-JVLL>].

<sup>64</sup> See *id.*; Kirsten Wegner, *When a Regulatory Last Resort Becomes the Only Resort for Market Participants*, TRADERS MAG. (Sept. 26, 2023), <https://www.tradersmagazine.com/am/when-a-regulatory-last-resort-becomes-the-only-resort-for-market-participants/> [<https://perma.cc/BG8T-JE8S>].

<sup>65</sup> See, e.g., *Joint Comment Letter*, *supra* note 54; see also *About*, SIFMA <https://www.sifma.org/about/> [<https://perma.cc/4G5Y-ESG6>] (“SIFMA’s broker-dealer members comprise nearly 90% of U.S. market share by revenues and 80% of financial advisors managing \$13 trillion of client assets.”).

individual companies and other less resourced commenters likely faced an even tighter strain to provide comments.<sup>66</sup>

The financial industry also argued that the SEC's rulemaking practices could lead to conflicting and poorly drafted rules.<sup>67</sup> This argument stemmed from the belief that the SEC was not considering the complicated, interrelated nature of their multiple significant rule proposals, each with a different comment period that often did not overlap with the others.<sup>68</sup> As a result, commenters could not assess proposals in parallel to understand their aggregate impact.<sup>69</sup> Some industry participants argued that the SEC was prioritizing its policy agenda over adopting well-reasoned rules because the agency was significantly underestimating the implementation and compliance costs for new rules.<sup>70</sup> Separately, the SEC's rulemaking activity led the financial industry to bring lawsuits arguing that the SEC promulgated the rules in violation of the APA or in excess of the agency's statutory authority,<sup>71</sup> exposing the SEC to increased litigation risk.<sup>72</sup>

In response to these concerns, Congress urged the SEC to heed caution in its pace of rulemaking.<sup>73</sup> A bipartisan group from the House of Representatives warned Chair Gensler that the "abbreviated [comment] period" the SEC had allotted for a significant proposed rule "[would] likely hinder engagement from Congress, investors, and other market

---

<sup>66</sup> See *Crickets*, *supra* note 18 (discussing how small- and medium-sized advisers expressed to Commissioner Peirce that "dealing with existing rules and implementing new ones precludes spending the time to read, let alone comment on, proposed rules").

<sup>67</sup> See *id.*; COMM. ON CAP. MKTS. REGUL., THE UNPRECEDENTED PACE OF SEC PROPOSED AND FINAL RULEMAKINGS CONTINUES 3 (2023), <https://capmktsreg.org/wp-content/uploads/2024/03/CCMR-Statement-on-SEC-Agenda-Mapping-08.31.2023.pdf> [<https://perma.cc/W8YN-VH7Y>].

<sup>68</sup> Kenneth E. Bentsen, Jr., *America's Capital Markets Are Too Important to Be Put at Risk*, SIFMA (Nov. 3, 2023), <https://www.sifma.org/resources/news/americas-capital-markets-are-too-important-to-be-put-at-risk/> [<https://perma.cc/96VM-CVZN>].

<sup>69</sup> See Pan, *supra* note 63.

<sup>70</sup> See *id.*; Wegner, *supra* note 64 (describing comment letters as a "facade" in the SEC's current rulemaking environment).

<sup>71</sup> See Michelle Price & Carolina Mandl, *Wall Street Heads to Court to Fend Off Biden's Regulators*, REUTERS (Nov. 21, 2023, 6:41 AM), <https://www.reuters.com/markets/us/wall-street-heads-court-fend-off-bidens-regulators-2023-11-21> [<https://perma.cc/XB86-4E5J>]; Bob Pisani, *Gensler Is Testifying Before Congress and Facing Increasing Lawsuits over His Many Rule Changes*, CNBC (Sept. 27, 2023, 10:10 AM), <https://www.cnbc.com/2023/09/27/sec-chair-gensler-facing-increasing-lawsuits-over-his-rule-changes.html> [<https://perma.cc/9BMX-TU9Y>].

<sup>72</sup> See OFF. OF INSPECTOR GEN., SEC, THE INSPECTOR GENERAL'S STATEMENT ON THE SEC'S MANAGEMENT AND PERFORMANCE CHALLENGES 3 (2022).

<sup>73</sup> See, e.g., Matthew Goldstein, *Senate Republicans Grill S.E.C. Chair on Pace of Rule Making*, N.Y. TIMES (Sept. 12, 2023), <https://www.nytimes.com/2023/09/12/business/sec-gary-gensler-senate-hearing.html> [<https://perma.cc/QZ7V-BLK5>]; *Examining the SEC's Agenda: Unintended Consequences for U.S. Capital Markets and Investors: Hearing Before the Subcomm. on Cap. Mkts. of the H. Comm. on Fin. Servs.*, 118th Cong. 2 (2023) (statement of Rep. Ann Wagner, Chairwoman, Subcomm. on Cap. Mkts.); *SEC Overreach Hearing*, *supra* note 61, at 34 (statement of Rep. Mike Lawler, Member, Subcomm. on Cap. Mkts.).

participants.”<sup>74</sup> A dozen Democratic senators reportedly sent a letter to Chair Gensler privately urging the SEC to provide sufficient comment periods so that “there is adequate time to evaluate each individual rule as well as how those rules interact with existing and other proposed rules.”<sup>75</sup> In May 2024, a member of the House Financial Services Committee introduced legislation that would set mandatory minimum comment periods of sixty days for all SEC rulemakings.<sup>76</sup> Separately, the SEC’s Office of Inspector General, an independent office that audits the SEC’s operations, reported that SEC staff members “raised concerns about increased risks and difficulties managing resources.”<sup>77</sup> The concerns stemmed from the surge in rulemaking, an increase in attrition, less feedback from the public because of shortened comment periods, less time for research and analysis, and increased litigation risk.<sup>78</sup>

## II. CURRENT APPROACHES TO REVIEW OF COMMENT PERIODS

The SEC’s rulemaking activity raises questions about how a court should review an allegedly deficient comment period. In answering this question, it is necessary to consider whether a court can review a comment period, the level of deference it should grant the agency if it does so, and the test it should employ.

### A. *Threshold Question: Is Review Permissible Under Vermont Yankee?*

The Supreme Court’s 1978 *Vermont Yankee* decision significantly constrained courts’ ability to impose procedural requirements above the minimum notice-and-comment procedures required by section 553 of the APA.<sup>79</sup> Little scholarly work addresses whether review of comment periods is permissible under *Vermont Yankee*, but some argue that a judicially imposed minimum comment period violates the decision by imposing additional procedures beyond the APA’s requirements.<sup>80</sup>

---

<sup>74</sup> Letter from Bill Foster et al., Reps., United States House of Reps., to Gary Gensler, Chair, SEC 2 (Apr. 13, 2022), <https://www.sec.gov/comments/s7-03-22/s70322-20127548-288697.pdf> [<https://perma.cc/MX3Y-SW5Z>].

<sup>75</sup> Declan Harty, *Senate Dems Press SEC Chair to Slow Wall Street Rules*, POLITICO (Oct. 20, 2022, 4:12 PM), <https://www.politico.com/news/2022/10/20/senate-democrats-gensler-public-comments-sec-00062732> [<https://perma.cc/R52B-DQ3P>].

<sup>76</sup> H.R. 8255, 118th Cong. (2024).

<sup>77</sup> OFF. OF INSPECTOR GEN., *supra* note 72, at 3.

<sup>78</sup> *Id.*

<sup>79</sup> See GLICKSMAN & LEVY, *supra* note 2, at 424–25.

<sup>80</sup> See, e.g., Kadie Martin, Comment, *So Much to Comment on, So Little Time: Notice-and-Comment Requirements in Agency Informal Rulemaking Under the Administrative Procedure Act*, 61 B.C. L. REV. (E. SUPP.) II.-132, II.-151–52 (2020).

Although *Vermont Yankee* limited judicial imposition of additional procedures, it did not prohibit courts from interpreting the APA.<sup>81</sup> Judicial review of comment periods is permissible because it is an interpretation of the APA that falls within the widely accepted category of judge-made “administrative common law.”<sup>82</sup>

### I. Vermont Yankee’s Constraints on Procedure

Prior to *Vermont Yankee*, several courts, including most prominently the U.S. Court of Appeals for the D.C. Circuit, imposed additional procedures for notice-and-comment rulemaking that were not mandated by the APA or other statutes.<sup>83</sup> Courts imposed these requirements—for example, cross-examination or highly detailed notices of proposed rulemaking—in response to perceived inadequacies in the APA’s notice-and-comment requirements and fears that agencies were serving the interests of industry groups.<sup>84</sup>

In *Vermont Yankee*, the Supreme Court significantly constrained the ability of courts to impose procedures beyond the minimum requirements of section 553.<sup>85</sup> The question in the case was whether the Atomic Energy Commission (“AEC”), a federal agency, used adequate notice-and-comment procedures in its promulgation of a rule regulating the environmental impacts of nuclear power plants.<sup>86</sup> The D.C. Circuit held that despite meeting the section 553 notice-and-comment requirements, the AEC employed inadequate rulemaking procedures because it had relied on insufficient evidence to justify its decisions and develop the factual record, which could have been remedied through cross-examination and discovery.<sup>87</sup>

The Supreme Court reversed the D.C. Circuit and said it “had seriously misread or misapplied” the APA.<sup>88</sup> The Court held that section 553 establishes the “maximum procedural requirements” for notice-and-comment rulemaking and that reviewing courts have no authority

---

<sup>81</sup> See Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 12; Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 83 (2022); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1305 (2012).

<sup>82</sup> See Davis, *supra* note 81, at 7.

<sup>83</sup> GLICKSMAN & LEVY, *supra* note 2, at 424–25; see also Scalia, *supra* note 5, at 348–52 (discussing the cases that imposed these heightened procedures).

<sup>84</sup> See Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 857 (2007).

<sup>85</sup> See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 525 (1978).

<sup>86</sup> See *id.* at 539.

<sup>87</sup> See *id.* at 535, 541; Scalia, *supra* note 5, at 353–54.

<sup>88</sup> *Vt. Yankee*, 435 U.S. at 525.

to require additional procedures beyond those mandated in the APA.<sup>89</sup> It maintained that “[a]bsent constitutional constraints or extremely compelling circumstances,”<sup>90</sup> agencies “should be free to fashion their own rules of procedure.”<sup>91</sup> The Court concluded that the APA’s legislative history and the *Attorney General’s Manual on the Administrative Procedure Act*<sup>92</sup>—viewed as a contemporaneous interpretation of the APA—both confirm that agencies and not courts can decide whether to impose additional procedures.<sup>93</sup> It warned that permitting courts to impose additional procedures would lead to unpredictable judicial review because a court would subjectively determine whether the agency employed procedures to reach “the ‘best’ or ‘correct’ result.”<sup>94</sup> As a consequence, agencies would always adopt full adjudicatory procedures to avoid reversal, frustrating the APA’s purpose and depriving agencies of the benefits of notice-and-comment rulemaking, such as efficiency.<sup>95</sup>

*Vermont Yankee* set a boundary on the scope of section 553 but said little about how courts should interpret the notice-and-comment rulemaking requirements contained within the statute.<sup>96</sup> Scholars have debated the extent to which *Vermont Yankee* has limited courts’ ability to interpret the meaning of section 553 given the statute’s minimal language.<sup>97</sup> One approach argues that *Vermont Yankee* can be read (1) broadly, requiring strict adherence to the language of the requirements set out in section 553 according to the plain meaning of the text; (2) narrowly, to strike down only the specific additional procedures required by the D.C. Circuit in the case; or (3) “naturally,” so as to require all procedural requirements to be “firmly grounded in some

---

<sup>89</sup> *Id.* at 524.

<sup>90</sup> *Id.* at 543.

<sup>91</sup> *Id.* (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)).

<sup>92</sup> U.S. DEP’T OF JUST., ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947).

<sup>93</sup> *Vt. Yankee*, 435 U.S. at 545–46.

<sup>94</sup> *Id.* at 546.

<sup>95</sup> *See id.* at 547.

<sup>96</sup> *See* Kristin E. Hickman & Mark R. Thomson, *Textualism and the Administrative Procedure Act*, 98 NOTRE DAME L. REV. 2071, 2091–94 (2023) (“[A]lthough *Vermont Yankee* and its progeny establish a textual line that courts may not cross, the Supreme Court also left the lower courts with a fair amount of latitude in construing the APA’s text.”); *see also* Peter L. Strauss, Dedication, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1412 (1996) (“Emphatic as the *Vermont Yankee* Court was about the impropriety of judicial improvisation of procedures outside the Act, it did not speak to evolving interpretation within it . . .”).

<sup>97</sup> *See, e.g.*, Beermann & Lawson, *supra* note 84, 871–72 (arguing that courts should read *Vermont Yankee* narrowly such that it permits them to review agency procedures); Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV. 7, 19–20 (2022) (discussing the perceived misalignment between the legal principles outlined in *Vermont Yankee* and the way in which it has been applied by lower courts over the years).

source of positive statutory, regulatory, or constitutional law.”<sup>98</sup> In reality, however, the Supreme Court has read *Vermont Yankee* in none of these ways, instead invoking the case only when the Court disagrees with a procedural requirement.<sup>99</sup>

## 2. *Administrative Common Law*

The extensive judicial innovation in administrative law that has occurred since *Vermont Yankee* contradicts a broad reading of the decision.<sup>100</sup> Since the APA’s enactment in 1946, the administrative state has grown dramatically and so have challenges to agency action.<sup>101</sup> As a result, courts have grappled with the minimalist text of section 553 by extrapolating several requirements for notice-and-comment rulemaking.<sup>102</sup> This is an example of what has come to be known as “administrative common law.”<sup>103</sup> Other prominent examples include requiring agencies to disclose the technical studies and data they rely on when proposing a rule,<sup>104</sup> address the “significant” comments they receive,<sup>105</sup> and ensure that a final rule is a “logical outgrowth” of a proposed rule.<sup>106</sup> Some scholars argue that administrative common law is both necessary and compatible with the APA’s text, structure, and legislative history.<sup>107</sup> Others contend that judicial interpretation of section 553 contradicts Congress’s intent that agencies maintain discretion over rulemaking procedures.<sup>108</sup> In practice,

---

<sup>98</sup> See Beermann & Lawson, *supra* note 84, at 860.

<sup>99</sup> See Levin, *supra* note 97, at 21–22.

<sup>100</sup> See Metzger, *supra* note 81, at 1305.

<sup>101</sup> See Eskridge & Ferejohn, *supra* note 4, at 1928–29.

<sup>102</sup> See *id.* at 1929; Levin, *supra* note 97, at 12.

<sup>103</sup> Bremer, *supra* note 81, at 81–86.

<sup>104</sup> See, e.g., *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394, 402 (D.C. Cir. 1973); *Conn. Light & Power Co. v. Nuclear Regul. Comm’n*, 673 F.2d 525, 530–31 (D.C. Cir. 1982); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008). In *American Radio Relay League v. FCC*, then-Judge Kavanaugh wrote that the requirement that agencies disclose technical studies they rely on “cannot be squared with the text of § 553 of the APA” and that its “lack of roots in the statutory text creates a serious jurisprudential problem because the Supreme Court later rejected this kind of freeform interpretation of the APA [in *Vermont Yankee*].” *Id.* at 246 (Kavanaugh, J., concurring).

<sup>105</sup> See, e.g., *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015).

<sup>106</sup> See, e.g., *Nat’l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986); *Am. Fed’n of Lab. & Cong. of Indus. Orgs. v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985).

<sup>107</sup> See, e.g., Metzger, *supra* note 81, at 1320–21; Bremer, *supra* note 81, at 132 (“The text [of section 553] invites, even demands, post-enactment liquidation of its meaning.”); Eskridge & Ferejohn, *supra* note 4, at 1929–33; Davis, *supra* note 81, at 12.

<sup>108</sup> See Kovacs, *supra* note 5, at 217; see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 118 (1998) (“For many other standard administrative law doctrines, however, the textual home in statutory law either is nonexistent or has never been identified.”).

the Supreme Court's acceptance of administrative common law<sup>109</sup> supports a narrow reading of *Vermont Yankee*.

### 3. *Judicial Review of Comment Periods Is Permissible Under Vermont Yankee*

In several cases since *Vermont Yankee*, courts have reviewed the length of agency comment periods and set baseline standards for comment period length.<sup>110</sup> In setting these baseline standards, courts have interpreted section 553's requirement that agencies "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."<sup>111</sup> Courts have primarily taken two approaches: (1) recognizing a minimum APA comment period of thirty days, or (2) evaluating whether an agency has provided a "meaningful opportunity" to comment.<sup>112</sup> The first approach turns the widely used thirty-day norm into a rule of administrative common law. The second approach creates a flexible standard that requires a more fact-intensive analysis. Courts engaging in each approach have done so without mention of *Vermont Yankee*,<sup>113</sup> perhaps indicating that they felt they were acting within the textual boundaries of section 553.

In a recent challenge to an SEC rule, a district court concluded that it could not evaluate the rule's comment period under the second approach because of *Vermont Yankee*.<sup>114</sup> The court recognized the thirty-day minimum comment period endorsed by the Supreme Court but said it would "not introduce its own policy preferences about what is a 'meaningful opportunity'" because doing so would involve imposing additional procedures prohibited by *Vermont Yankee*.<sup>115</sup> This analysis misconstrues the scope of *Vermont Yankee* by accepting one approach to interpretation of comment periods but rejecting another approach that is equally valid under *Vermont Yankee* and within the accepted realm of administrative common law. The court could have concluded that a thirty-day comment period was sufficient under the circumstances but should not have shied away from evaluating whether the SEC's comment period gave the public a meaningful opportunity to comment.

---

<sup>109</sup> See, e.g., *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (endorsing the "logical outgrowth" test); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (explaining that agencies "must consider and respond to significant comments" even though such actions are not explicitly required by the APA's text).

<sup>110</sup> See *infra* Section II.C.

<sup>111</sup> 5 U.S.C. § 553(c); see *infra* Section II.C.

<sup>112</sup> See *infra* Section II.C.

<sup>113</sup> See discussion *infra* Section II.C.

<sup>114</sup> See *Nat'l Ass'n of Mfrs. v. SEC*, 644 F. Supp. 3d 342, 354 (W.D. Tex. 2022).

<sup>115</sup> See *id.*

## B. Standard of Review

The standard of review a court uses to review agency action affects the level of deference given to the agency decision.<sup>116</sup> Courts typically review comment period lengths as a discretionary decision<sup>117</sup> and therefore use the arbitrary and capricious standard provided by APA section 706, the statute's scope of review provision.<sup>118</sup> A court could also use *de novo* review and give the agency no deference.<sup>119</sup> A uniform approach for reviewing comment periods would provide the most clarity, but both of these approaches are suitable.

### 1. Arbitrary and Capricious

The arbitrary and capricious standard is used to review agency factual findings and discretionary decisions.<sup>120</sup> The standard is deferential but requires agencies to provide a reasoned explanation for their decisions.<sup>121</sup> A court reviewing under this standard may not “substitute its judgment for that of the agency” but “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>122</sup> The Supreme Court articulated a test for whether an agency has acted arbitrarily in its 1983 *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*<sup>123</sup> decision. Under the *State Farm* test, courts typically find that an agency has acted arbitrarily if it “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>124</sup>

Most courts consider the length of a comment period a discretionary decision for agencies and therefore review comment period length using the arbitrary and capricious standard.<sup>125</sup> For example, in *California*

---

<sup>116</sup> GLICKSMAN & LEVY, *supra* note 2, at 61–65.

<sup>117</sup> See *infra* notes 126–33 and accompanying text.

<sup>118</sup> Section 706(2)(A) permits a court to “hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

<sup>119</sup> See *infra* Section II.B.2.

<sup>120</sup> JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 18 (2016).

<sup>121</sup> See GLICKSMAN & LEVY, *supra* note 2, at 65.

<sup>122</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>123</sup> 463 U.S. 29 (1983).

<sup>124</sup> *Id.* at 43.

<sup>125</sup> See *infra* notes 126–33 and accompanying text.

*ex rel. Becerra v. U.S. Department of the Interior*,<sup>126</sup> a district court held that the Department of the Interior (“DOI”) repealed a rule arbitrarily and capriciously because DOI failed to consider an important aspect of the problem when it did not provide a meaningful opportunity to comment, precluding DOI from receiving substantive comments about whether the rule should be repealed.<sup>127</sup> In *North Carolina Growers’ Ass’n v. United Farm Workers*,<sup>128</sup> the Fourth Circuit similarly held that the Department of Labor acted arbitrarily and capriciously by “ignor[ing] important aspects of the problem” when it failed to provide a meaningful opportunity for comment.<sup>129</sup>

The D.C. Circuit and Third Circuit have applied the arbitrary and capricious standard by asking generally whether an agency acted reasonably. In *National Lifeline Ass’n v. FCC*,<sup>130</sup> the D.C. Circuit found a rule arbitrary and capricious because the Federal Communications Commission (“FCC”) used a single, short comment period after promising it would provide an additional, longer comment period, lulling commenters into thinking they did not need to submit comments during the initial comment period.<sup>131</sup> Similarly, in *Prometheus Radio Project v. FCC*,<sup>132</sup> the Third Circuit found an FCC rule arbitrary and capricious because the FCC provided too short a comment period and had already circulated the draft final rule internally while the comment period was open, suggesting the agency was not planning to use the feedback.<sup>133</sup> These two cases demonstrate that, although generally deferential, the arbitrary and capricious standard will strike down agency actions that lack good-faith, reasoned decision-making.

## 2. *De Novo Review*

Although most courts have used the arbitrary and capricious standard to review agency comment periods, a court could also review comment periods *de novo* under APA section 706(2)(D), which requires a court to set aside agency action that is “without observance of procedure required by law.”<sup>134</sup> Some courts use a *de novo* standard to evaluate compliance with section 553, granting an agency no

---

<sup>126</sup> 381 F. Supp. 3d 1153 (N.D. Cal. 2019).

<sup>127</sup> *See id.* at 1177–78.

<sup>128</sup> 702 F.3d 755 (4th Cir. 2012).

<sup>129</sup> *See id.* at 770 (quoting *Ohio River Valley Env’t Coal., Inc. v. Kempthorne*, 473 F.3d 94, 103 (4th Cir. 2006)). The Fourth Circuit described the arbitrary and capricious standard for procedural rules as “narrow” and “strict.” *See id.* at 764.

<sup>130</sup> 921 F.3d 1102 (D.C. Cir. 2019).

<sup>131</sup> *See id.* at 1117–18.

<sup>132</sup> 652 F.3d 431 (3d Cir. 2011).

<sup>133</sup> *See id.* at 453.

<sup>134</sup> 5 U.S.C. § 706(2)(D).

deference.<sup>135</sup> For example, the D.C. Circuit announced a de novo standard for reviewing an agency's invocation of the good cause exception, which exempts an agency from using notice-and-comment procedures to promulgate a rule.<sup>136</sup> The argument for de novo review of procedural compliance is that agencies have "no interpretive authority over the APA" and therefore should not determine whether their procedures meet the statutory requirements laid out in section 553.<sup>137</sup> No court has explicitly announced a de novo standard for review of comment periods, but some courts have reviewed comment periods without granting an agency any deference.<sup>138</sup> Although the arbitrary and capricious standard is more deferential, a court reviewing de novo should still consider whether an agency acted reasonably under the circumstances when it applies the substantive test of whether the agency meaningfully engaged the public.

### C. *Tests for Review and a Recent SEC Example*

As discussed above, courts typically review comment periods using two approaches: Some courts use a specific length of time as a minimum acceptable standard.<sup>139</sup> Other courts ask whether there was a meaningful opportunity to comment.<sup>140</sup> Although developing a baseline length can provide clarity to the agency and public, courts should focus their analysis on whether there was a meaningful opportunity to comment to holistically evaluate whether the public comment period achieved its purpose.

#### 1. *Specific Durations*

Some courts have endorsed minimum-baseline comment period lengths as permissible under the APA.<sup>141</sup> These pronouncements are useful but generally insufficient on their own because analyzing a comment period requires evaluating the specific rulemaking circumstances.

---

<sup>135</sup> COLE, *supra* note 120, at 16.

<sup>136</sup> See *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014); see also Kyle Schneider, Note, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 255–56 (2021) (discussing courts' use of de novo review when agencies claim their actions are based upon "good cause"). An agency can bypass notice-and-comment rulemaking for "good cause" when it finds "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B).

<sup>137</sup> *Sorenson*, 755 F.3d at 706; see Schneider, *supra* note 136, at 256.

<sup>138</sup> See, e.g., *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009); *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 501 F. Supp. 3d 792, 818–22 (N.D. Cal. 2020).

<sup>139</sup> See *infra* Section II.C.1.

<sup>140</sup> See *infra* Section II.C.2.

<sup>141</sup> See *infra* notes 142–45 and accompanying text.

In *Petry v. Block*,<sup>142</sup> the D.C. Circuit stated that thirty days is not “talismatic” but looked to the ACUS policy recommendations to conclude that a “barebones” comment period would be at least thirty days.<sup>143</sup> In 2019, the D.C. Circuit more explicitly endorsed the thirty-day standard when it held that thirty days is “generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.”<sup>144</sup> Most significantly, the Supreme Court in 2019 characterized the APA as having a minimum comment period of thirty days.<sup>145</sup>

## 2. *Meaningful Opportunity to Comment*

Other courts ask whether the public has had a meaningful opportunity to comment when evaluating a comment period.<sup>146</sup> This is a fact-specific inquiry that requires a court to assess the reasons that the agency used a certain comment period length and whether the public was genuinely deprived of submitting good-faith comments.<sup>147</sup> For example, in *North Carolina Growers’ Ass’n v. United Farm Workers*, the Fourth Circuit held that a ten-day comment period for a Department of Labor rule failed to comply with section 553 because its “exceedingly short duration” did not provide a meaningful opportunity to comment.<sup>148</sup> In *California ex rel. Becerra v. U.S. Department of the Interior*, the court compared the length of comment period for a proposed rule repeal—thirty days—to the comment period when the rule was initially proposed—120 days.<sup>149</sup> The court found that the agency failed to provide a meaningful opportunity to comment because of the shortened comment period for the rule repeal combined with the agency’s failure to fully consider the comments it received.<sup>150</sup>

In *Prometheus Radio Project v. FCC*, the Third Circuit found that the FCC’s use of a twenty-eight-day comment period—compared to its standard practice of ninety days—was insufficient because it was significantly shorter than usual and because the rule at issue was of “great public concern.”<sup>151</sup> In addition to the insufficiently long comment

---

<sup>142</sup> 737 F.2d 1193 (D.C. Cir. 1984).

<sup>143</sup> *See id.* at 1201–02.

<sup>144</sup> *See Nat’l Lifeline Ass’n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019). The Fifth Circuit also has endorsed the thirty-day minimum requirement. *See Chem. Mfrs. Ass’n v. EPA*, 899 F.2d 344, 347 (5th Cir. 1990).

<sup>145</sup> *Azar v. Allina Health Servs.*, 587 U.S. 566, 570 (2019).

<sup>146</sup> *See, e.g., Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009).

<sup>147</sup> *See infra* notes 148–50 and accompanying text.

<sup>148</sup> *N.C. Growers’ Ass’n v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012).

<sup>149</sup> *California ex rel. Becerra v. U.S. Dep’t of the Interior*, 381 F. Supp. 3d 1153, 1177 (N.D. Cal. 2019).

<sup>150</sup> *Id.* at 1177–78.

<sup>151</sup> *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011).

period, the court concluded that the FCC failed to meet its “obligation to remain ‘open-minded’ about the issues raised” in public comments because the FCC had circulated a draft of the final rule during the comment period.<sup>152</sup>

The test of whether an agency provided a meaningful opportunity to comment gives courts the flexibility to evaluate agency decision-making in a context-specific manner that accounts for the circumstances of rulemaking. Agencies act on a range of timelines—sometimes quickly to address an emergency or over a long period to promulgate a highly complex and technical rule—and courts should be able to account for these differences. Importantly, the meaningful opportunity test asks whether the public was able to provide thoughtful comments for the agency to consider, which addresses the APA’s core aim to promote public participation and transparency in the rulemaking process.

### 3. *A Recent SEC Example Represents Diverging Approaches*

A decision by the Sixth Circuit in September 2024 demonstrates the diverging approaches to evaluating comment periods. In *Chamber of Commerce of the United States v. SEC*,<sup>153</sup> the Sixth Circuit affirmed a district court’s decision to uphold a 2022 SEC rule that repealed a 2020 rule on proxy-advice regulations.<sup>154</sup> The Sixth Circuit held, among other things, that the SEC had provided a sufficient comment period.<sup>155</sup> Judge Bush dissented, finding the rescission procedurally invalid, in part because the comment period was insufficient.<sup>156</sup> The Chamber of Commerce argued that the thirty-day comment period for the 2022 rule failed to observe procedure required by law because (1) it fell over the Thanksgiving and Christmas holidays, (2) “the original rule had a 60-day [comment] period that yielded far more comments” than the 2022 rule, (3) “the SEC’s stated ordinary practice . . . calls for significant rule changes to have at least a 60-day [comment] period,” and (4) several commenters had requested an extension of the comment period.<sup>157</sup>

The district court found “the SEC’s decision to rely on such a short comment period, over the objections of interested parties and in apparent departure from much of the agency’s usual practice, to be somewhat troubling.”<sup>158</sup> Despite these concerns, the court found that the Chamber of Commerce had “done very little to establish that the 30-day period

---

<sup>152</sup> See *id.* (quoting *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009)).

<sup>153</sup> 115 F.4th 740 (6th Cir. 2024).

<sup>154</sup> *Id.* at 755–58.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 763–64 (Bush, J., dissenting).

<sup>157</sup> *Chamber of Com. of the U.S. v. SEC*, 670 F. Supp. 3d 537, 552 (M.D. Tenn. 2023), *aff’d*, 115 F.4th 740.

<sup>158</sup> *Id.* at 552–53.

was actually inadequate.”<sup>159</sup> After reviewing the record, the district court concluded that there had been a robust public debate in the promulgation of the 2020 proxy rule, so the arguments that commenters would want to submit “had already been assembled” once the SEC proposed repealing the rule.<sup>160</sup> The court declared the rule procedurally valid, stating that the thirty-day comment period was “within the bounds of what was legally permissible,” even if it was “unnecessarily short or even frustratingly short.”<sup>161</sup>

The Sixth Circuit largely affirmed the district court and emphasized some additional points.<sup>162</sup> The majority reasoned that finding the comment period insufficient would amount to holding the SEC to an “erroneously heightened procedural standard.”<sup>163</sup> The court concluded that the APA requires a “meaningful opportunity to comment” but concluded that thirty days is largely accepted as the *de facto* norm absent “extenuating circumstances.”<sup>164</sup> Further, the majority found that the case law cited by the Chamber of Commerce was distinguishable because the comment periods in those cases had content restrictions, unlike the rule repeal at issue.<sup>165</sup> Finally, the court rejected the argument that failure to extend the comment period was procedural error because the plaintiffs did not “identify any novel substantive arguments they would have made or specific data they would have presented had the comment window been extended.”<sup>166</sup>

Judge Bush dissented, finding sixty days, not thirty, to be an established norm for comment periods and no justifiable reason for the SEC to refuse to extend the comment period without exigent circumstances.<sup>167</sup> He also cited factors to consider when evaluating the length of a comment period, including the complexity of the rule, its impact, public interest in the proposal, and whether exigent conditions justify a shorter comment period.<sup>168</sup> Judge Bush suggested that the SEC’s refusal to extend the comment period for the rule repeal to sixty days—the comment period when the rule was initially proposed—indicated that the SEC had already made up its mind and was discounting any public

---

<sup>159</sup> *Id.* at 553.

<sup>160</sup> *See id.*

<sup>161</sup> *Id.* at 553–54 (“A 30-day period may have been unnecessarily short or even frustratingly short, but that does not mean that it was impermissibly short. The evidence in the record suggests that 30 days was a sufficient period of time for commenters to formulate and provide their views on the proposal, which is what the APA requires.”).

<sup>162</sup> *See infra* notes 163–66 and accompanying text.

<sup>163</sup> Chamber of Com. of the U.S. v. SEC, 115 F.4th 740, 755 (6th Cir. 2024).

<sup>164</sup> *Id.* at 755–56.

<sup>165</sup> *Id.* at 756–57.

<sup>166</sup> *Id.* at 758.

<sup>167</sup> *See id.* at 763–64 (Bush, J., dissenting).

<sup>168</sup> *Id.* at 763.

feedback.<sup>169</sup> He also explained that there was not harmless error in a shorter comment period because the record indicated that several commenters wanted an extension so they could submit more data concerning the economic impact of repealing the rule.<sup>170</sup>

Key points of contention between the majority and dissent were (1) whether the established norm for a comment period is thirty or sixty days, and (2) whether the SEC should have provided at least the same comment period for the rule repeal as the initial rule proposal.<sup>171</sup> The majority and dissent also disagreed whether the plaintiffs were harmed by the SEC's refusal to extend the comment period.<sup>172</sup>

The majority's conclusion that the SEC need not extend the comment period beyond thirty days does not fully address whether there was a meaningful opportunity to comment and applies an overly deferential standard of review.<sup>173</sup> Whether the norm for comment periods is thirty or sixty days is a disputed factual question that cannot be easily discerned because there is no codified minimum duration.<sup>174</sup> Rather, a court should focus on whether the agency provided a meaningful opportunity to comment by assessing if commenters raised concerns about their ability to comment within the established period and whether the agency had a legitimate reason or explanation for refusing to grant a comment period extension. In *Chamber of Commerce of the U.S. v. SEC*, the majority did not assess whether the SEC used reasoned decision-making when it refused to extend a comment period despite there being no apparent exigent circumstances that prevented the SEC from granting the extension.<sup>175</sup> Judge Bush's dissent more appropriately assessed whether the comment period was adequate based on the circumstances.<sup>176</sup>

### III. PROPOSED FACTORS FOR HIGH-VOLUME RULEMAKING

A significant increase in rulemaking that results in several major rule proposals with short comment periods warrants additional scrutiny because this rulemaking activity increases the burden on the public to analyze and provide input on significant regulatory changes. In these circumstances, courts should assess whether there was a meaningful opportunity to comment by considering additional factors that may

---

<sup>169</sup> *Id.* at 764.

<sup>170</sup> *Id.* at 764–65.

<sup>171</sup> *See id.* at 758–65.

<sup>172</sup> *Id.* at 764–65.

<sup>173</sup> *See id.* at 755–56 (majority opinion).

<sup>174</sup> *See supra* Sections I.A, II.C.1.

<sup>175</sup> *See Chamber of Com. of the U.S. v. SEC*, 115 F.4th at 764 (Bush, J., dissenting).

<sup>176</sup> *See id.*

account for the aggregate impact of several rules being proposed at once, rather than considering a single comment period in isolation.

### A. *Interrelated Nature of Rules*

When a plaintiff alleges that an agency has failed to provide a meaningful opportunity to comment, a court should consider whether the rule in question has been proposed simultaneously with other related rules. During the Biden Administration, the financial industry complained that the SEC promulgated several interrelated rules in a short period.<sup>177</sup> Situations such as this may warrant a longer comment period than if a rule were proposed in isolation because it may require consideration of how the rules could impact one another.<sup>178</sup>

Some district courts have assessed the interrelated nature of rules in analyzing comment periods.<sup>179</sup> During the final months of the first Trump Administration, the U.S. Department of Justice (“DOJ”) and the Executive Office for Immigration Review—a subagency of DOJ—promulgated a final rule that made significant changes to the U.S. immigration system.<sup>180</sup> These changes included shortening the briefing schedule for the Board of Immigration Appeals (“BIA”), limiting the grounds for the BIA to remand cases to immigration judges, and restricting the ability for the BIA and immigration judges to reopen or reconsider cases *sua sponte*.<sup>181</sup> The proposed rule had a thirty-day comment period and the comment period was not extended despite requests from several commenters.<sup>182</sup> Nonprofit legal groups sought to enjoin the rule in two separate cases, arguing that it was procedurally defective under section 553 because of an insufficient comment period.<sup>183</sup> In their briefs, the plaintiffs argued that their ability to submit timely and meaningful comments was severely burdened by the “staggered” rulemaking process of DOJ and the Department of Homeland Security (“DHS”) because the agencies had proposed several other

---

<sup>177</sup> See *supra* Section I.C.

<sup>178</sup> See, e.g., *Rip Current Rulemakings*, *supra* note 18 (“We can avoid creating regulatory rip currents by recalibrating our agenda to focus on issues core to the protection of investors and operation of our markets and by slowing down the pace to ensure that we and the public can think about what we are doing.”).

<sup>179</sup> See, e.g., *Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919, 955–56 (N.D. Cal. 2021); *Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, No. 21-00094, 2021 WL 3609986, at \*3 (D.D.C. Apr. 4, 2021).

<sup>180</sup> See Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81,588, 81,651–56 (Dec. 16, 2020) (codified at 8 C.F.R. pts. 1003, 1240 (2024)).

<sup>181</sup> See *id.*

<sup>182</sup> See *Centro Legal de la Raza*, 524 F. Supp. 3d at 935.

<sup>183</sup> See *id.* at 953–54; *Cath. Legal Immigr. Network*, 2021 WL 3609986, at \*2–3.

rules related to the immigration process.<sup>184</sup> The district courts deciding the cases both granted preliminary injunctions and found the rule likely violated section 553 of the APA.<sup>185</sup>

In one of the cases, *Centro Legal de la Raza v. Executive Office for Immigration Review*,<sup>186</sup> the district court stated that the “staggered nature of [the] rulemaking in conjunction with other related rules resulted in an arbitrary and capricious failure to consider the combined impact of numerous intersecting policy changes.”<sup>187</sup> The court noted that thirty days is already a short comment period for a substantial rulemaking, which was further exacerbated by the combined timing with other proposed immigration rules.<sup>188</sup> As a result of the staggered but short comment periods, commenters were unable to consider how the other rules “intersected and impacted” the rule at issue.<sup>189</sup> The court concluded that the numerous intertwined rules promulgated at different times deprived the public of a meaningful opportunity to comment.<sup>190</sup>

In the other case, *Catholic Legal Immigration Network, Inc. v. Executive Office for Immigration Review*,<sup>191</sup> the court similarly reasoned that when an agency “engages in a slew of interrelated rulemaking activity,” a thirty-day comment period “is likely insufficient to provide a meaningful opportunity to comment on a highly technical and complex regulation.”<sup>192</sup> Although the cases were not appealed because the Trump Administration left office,<sup>193</sup> the cases stand as relevant examples because a main factor in the courts’ analyses of the comment period length was the effect of interrelated rulemakings and commenters’ ability to consider how the rules impacted one another.<sup>194</sup>

In another case relating to the first Trump Administration’s immigration rulemaking, a district court enjoined a rule issued by DHS that would have narrowed asylum eligibility on the grounds that it likely

---

<sup>184</sup> See Plaintiffs’ Notice of Motion and Motion for a Preliminary Injunction at 3, *Centro Legal de la Raza*, 524 F. Supp. 3d 919 (No. 21-cv-00463); Complaint for Declaratory and Injunctive Relief at 95, *Cath. Legal Immigr. Network*, 2021 WL 3609986 (No. 21-cv-00094).

<sup>185</sup> See *Centro Legal de la Raza*, 524 F. Supp. 3d at 954–55; *Cath. Legal Immigr. Network*, 2021 WL 3609986, at \*2.

<sup>186</sup> 524 F. Supp. 3d 919 (N.D. Cal. 2021).

<sup>187</sup> *Id.* at 955.

<sup>188</sup> See *id.* at 955, 958.

<sup>189</sup> *Id.* at 958.

<sup>190</sup> See *id.* at 962.

<sup>191</sup> No. 21-cv-00094, 2021 WL 3609986 (D.D.C. Apr. 4, 2021).

<sup>192</sup> *Id.* at \*3.

<sup>193</sup> See Priscilla Alvarez, *Federal Judge Blocks Last-Minute Trump Rule Limiting Asylum Claims*, CNN (Feb. 16, 2021, 5:37 PM), <https://www.cnn.com/2021/02/16/politics/immigration-asylum-trump-rule/index.html> [<https://perma.cc/2ELA-MD2H>] (explaining that the Biden Administration would be unlikely to defend a similar Trump-era asylum rule because of Biden’s commitment to restoring asylum at the southern border).

<sup>194</sup> See *Centro Legal de la Raza*, 524 F. Supp. 3d at 958.

violated section 553 of the APA.<sup>195</sup> The court analyzed the plaintiff's claims that the rule was procedurally defective under the APA although the case was ultimately decided on substantive grounds.<sup>196</sup> The court found that the thirty-day comment period for such a substantial rule—both in terms of the changes proposed and the subject matter—was already short.<sup>197</sup> The court noted that there were several other interrelated asylum-related rules promulgated by DHS around the same time that received sixty-day comment periods.<sup>198</sup> And the court said that although a “staggered” rulemaking process is “not dispositive on its own,” the “overall context” in which the rule was promulgated, given the already short comment period, made it an important factor in considering whether the comment period was sufficient.<sup>199</sup>

With respect to the SEC's recent rulemaking activity or other future agency rulemaking that demonstrates this pattern, a court could evaluate the interrelated nature of the rules proposed when analyzing a comment period. For example, if a proposed rule impacted a certain segment of the financial markets, the court could assess whether there were other related rules likely to impact the same segment of the markets. A court could evaluate whether one rule interacts with another to determine if commenters would benefit from analyzing the rules together or separately. Looking at the interrelated nature of the rules could help the court understand the cumulative impact of the proposals and whether a longer or overlapping comment period would be beneficial.<sup>200</sup> Like in *Centro Legal de la Raza*, a court could find a rule arbitrary and capricious because the SEC failed to consider an important aspect of the problem—in other words, a court could find the SEC did not consider the need for a longer comment period given the volume of rulemaking.<sup>201</sup>

---

<sup>195</sup> *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 501 F. Supp. 3d 792, 829 (N.D. Cal. 2020).

<sup>196</sup> *See id.* at 818–22, 829.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 820.

<sup>199</sup> *See id.* at 821.

<sup>200</sup> The financial industry publicly made the case that having more time to analyze how rules interacted with one another would be beneficial. *See, e.g., Pan, supra* note 63; Bentsen, *supra* note 68.

<sup>201</sup> In a case pending at the Fifth Circuit as of April 2025, a group of trade associations are challenging two SEC rules as arbitrary and capricious for being highly interconnected but contradictory. Although not related to comment periods, the case may illustrate whether courts are willing to consider interrelated rules substantively arbitrary and capricious. *See* Opening Brief for Petitioners at 1–5, *Nat'l Ass'n of Priv. Fund Managers v. SEC*, No. 23-60626 (5th Cir. Mar. 5, 2024).

### B. *Significance of the Rule*

A court should look at the significance of a proposed rule, both economically and substantively, to determine whether a longer comment period is warranted. Rule proposals are often highly complex and technical, and this complexity is likely to be compounded for a proposed rule that is economically significant or would make sweeping regulatory reforms.<sup>202</sup> In the context of an agency promulgating a high volume of rules, significant rules are likely to need even longer comment periods because commenters may wish to provide input on multiple significant proposals and will need time to analyze and respond to them.<sup>203</sup>

Courts have looked at the significance of a rule in determining the sufficiency of a comment period.<sup>204</sup> In one of the aforementioned cases concerning the Trump Administration's immigration rules, the court noted that the rule was considered by the Executive Office of Immigration Review to be a "significant regulatory action" that was drafted in accordance with the principles of Executive Orders 12,866 and 13,563, the Clinton and Obama executive orders recommending minimum comment periods of sixty days.<sup>205</sup> The comment period for the rule, however, was only thirty days.<sup>206</sup>

In *National Lifeline Ass'n*, the D.C. Circuit stated that thirty days is typically the minimum comment period necessary when "substantial rule changes are proposed."<sup>207</sup> Likewise, in *Prometheus Radio Project*, the Third Circuit considered that a rulemaking of "great public concern" should have a longer comment period to permit commenters to submit their views.<sup>208</sup> By focusing on whether the rule changes are "substantial," a court can place into context the overall significance of a rule, including its impacts on the economy and current regulatory scheme. Evaluating the significance of the rule may also help a court determine whether the agency has engaged in reasoned decision-making given the facts of the situation and the agency's choice.

In the case of the SEC, a reviewing court could look at whether the challenged rule is considered a significant rule compared to the SEC's

---

<sup>202</sup> See LUBBERS, *supra* note 29, at 307–08.

<sup>203</sup> See Wegner, *supra* note 64.

<sup>204</sup> See, e.g., *Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919, 955–56 (N.D. Cal. 2021); *Chamber of Com. of the U.S. v. SEC*, 115 F.4th 740, 763 (6th Cir. 2024) (Bush, J., dissenting).

<sup>205</sup> *Centro Legal de la Raza*, 524 F. Supp. 3d at 955–56 (quoting Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81,588, 81,643 (Dec. 16, 2020) (codified at 8 C.F.R. pts. 1003, 1240 (2024))); see *supra* notes 32–33 and accompanying text.

<sup>206</sup> See *Centro Legal de la Raza*, 524 F. Supp. 3d at 955.

<sup>207</sup> *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1118 (D.C. Cir. 2019).

<sup>208</sup> *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011).

rulemaking agenda.<sup>209</sup> Some SEC rules target a narrower segment of the financial markets and may be significant for a smaller group of regulated entities but not the entire financial industry. On the other hand, many of the rules under Chair Gensler's tenure brought sweeping changes to the regulatory system and affected most segments of U.S. capital markets.<sup>210</sup> Rules that apply more broadly, propose sweeping changes, or have a large economic impact should have longer comment periods to allow commenters to digest the changes. These proposals also tend to be the most complex and require more resources for commenters to analyze and provide feedback.

### C. Comparison to Previous Agency Action

A court should compare an agency's current rulemaking behavior—specifically the number of rules it proposed and the comment periods provided for those rules—to the agency's previous rulemaking behavior. This would demonstrate whether the agency has changed its pace of rulemaking activity in an unprecedented manner. It is important to compare the period of alleged increased activity with the agency's previous activity because the increase in rulemaking activity is a comparative, not absolute, metric. This approach would ground the court's analysis in quantitative data, which could help aid comparisons and prevent arbitrariness.

With respect to the SEC, a court could look at the number of rules promulgated by previous SEC chairs over the last few administrations and the corresponding comment periods.<sup>211</sup> Then, the court could determine if the SEC's increase in rulemaking is justified under the circumstances or if the rules should have longer comment periods. Although this is not a perfect metric, it can help diagnose whether a single lawsuit indicates a broader trend of diminished public engagement by an agency.

By analyzing the interrelated nature of rules, the relative importance of a rule, and the agency's rulemaking compared to previous time periods, a court can undertake an informed analysis of whether a rule's

---

<sup>209</sup> The SEC publicly posts its rulemaking agenda. *Rulemaking Activity*, SEC, <https://www.sec.gov/rules/rulemaking-activity> [<https://perma.cc/7K8P-2QKQ>].

<sup>210</sup> Brooke Masters, *Gary Gensler Unleashes Biggest SEC Regulatory Blitz Since Financial Crisis*, FIN. TIMES (Aug. 31, 2023), <https://www.ft.com/content/413408f9-8c57-4420-ae44-19ccd06df0d0> [<https://perma.cc/W44C-G3YG>]; *see, e.g.*, Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, 88 Fed. Reg. 51,896 (Aug. 4, 2023) (codified at 17 C.F.R. pts. 229, 232, 239, 240, 249 (2024)); The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

<sup>211</sup> SIFMA, a financial industry association, tracked these metrics during the Biden Administration. *See* SIFMA, *supra* note 61.

comment period deprives the public of a meaningful opportunity to comment.

#### CONCLUSION

The APA's notice-and-comment rulemaking requirements are designed to ensure that agencies exercising their quasi-legislative rulemaking functions meaningfully engage the public to encourage participatory democracy and create an open and transparent rulemaking process. Judicial review of comment periods is permissible under *Vermont Yankee* and sometimes favorable to ensure an agency provides a meaningful opportunity to comment. The Biden Administration SEC's rulemaking activity demonstrates the challenges to public engagement that can occur when an agency proposes many significant rules with short comment periods. In future cases, courts should consider the interrelated nature of rules, the significance of a rule, and an agency's overall rulemaking activity when determining if there has been a meaningful opportunity to comment.